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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

JILL A. COHEN et al., Plaintiffs and Appellants, v. PHILLIP ISAAC MYER, Defendant and Respondent.	B166028 (Los Angeles County Super. Ct. No. BC245619)

APPEAL from an order and judgment of the Superior Court of Los Angeles County, Marvin M. Lager, Judge. Reversed.

Law Offices of Paul L. Stanton, Paul L. Stanton and John F. Eyrich for Plaintiffs and Appellants.

Lacey, Dunn & Do and Barbara E. Dunn for Defendant and Respondent.

INTRODUCTION

Plaintiffs and appellants, Jill Cohen, individually, and Richard K. Diamond, as a bankruptcy trustee, sued defendant and respondent Phillip Isaac Myer for legal malpractice.[1] Plaintiffs alleged that in a bankruptcy case filed by Jill Cohen's former husband, non-party Stanley Cohen,[2] defendant negligently failed to file an adversary proceeding to object to the discharge of alleged debts owed to Jill by Stanley for Stanley's purported dissipation of community assets.

The trial court granted summary judgment in favor of defendant. We reverse. Plaintiffs raised a triable issue of material fact as to whether, absent defendant's alleged failure to file an adversary proceeding in Stanley's bankruptcy proceeding, Jill could have proved her breach of fiduciary duty claims and received a judgment against Stanley. Thus, Jill raised a triable issue of material fact as to whether defendant's conduct caused her damage.

FACTUAL AND PROCEDURAL BACKGROUND

To the extent there are disputed facts, we resolve all doubts in favor of the party opposing summary judgment. (*Leon v. Family Fitness Center (#107), Inc*. (1998) 61 Cal.App.4th 1227, 1232.)

1. *The Dissolution Action*

In 1967, Jill and Stanley were married. In 1996, Jill separated from Stanley and filed for dissolution after learning that he had had an extra-marital affair from 1988 to 1995. It is undisputed that Stanley spent, at a minimum, $1,329,910.76 on the affair.

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[1] In September 1999, Jill filed a voluntary Chapter 7 bankruptcy petition. She received a discharge in December 1999. In February 2001, the bankruptcy court granted Jill's petition to re-open the bankruptcy proceeding to pursue a claim against defendant for legal malpractice.

[2] For ease of reference and to avoid confusion, the Cohens shall be referred to as "Jill" and "Stanley."

2. *Stanley's Inheritance*

Stanley's father, Earl Cohen, died in 1975. In 1986, the superior court entered an order establishing the Earl Cohen Trust with Stanley and his mother, Ida Cohen, serving as trustees. Stanley was the primary beneficiary under the trust. He was to receive, at a minimum, $5,000 per month for the remainder of his life. In 1988, Stanley received $296,705 in distributions from the trust.

In 1989, Stanley's mother, Ida, passed away. At that time, Stanley inherited over $5 million, consisting of approximately $125,000 in cash, with the remainder in property interests.

3. *Stanley's Bankruptcy Proceeding and Discharge of Jill's Claims*

In March 1998, Stanley filed a Chapter 7 voluntary bankruptcy petition. In April 1998, Jill retained defendant to object to the discharge of her claims against Stanley in that proceeding. It is undisputed that defendant did not file any objections to the discharge of Jill's claims against Stanley. On February 1, 1999, the bankruptcy court discharged Jill's claims against Stanley.

4. *Effect of Stanley's Bankruptcy Discharge in Family Law Action*

Following the discharge of Jill's claims in Stanley's bankruptcy proceeding, Stanley filed a motion in the family law court for summary adjudication of Jill's claims regarding Stanley's alleged dissipation of community assets. In January 2001, the family law court entered an order concluding that any claims (other than support claims) which Jill had against Stanley prior to March of 1998, when Stanley filed the bankruptcy proceeding, were discharged.

5. *Jill Sues Defendant for Malpractice*

In February 2001, Jill filed the present malpractice action against defendant. She alleged that she had viable claims against Stanley for breach of fiduciary duty. Jill alleged that starting in 1988, Stanley dissipated community assets, and but for defendant's negligence in failing to file an adversary proceeding in Stanley's bankruptcy action, she would have proven her claims and received a judgment against Stanley.

6. *Defendant's Summary Judgment*

In June 2002, defendant filed a motion for summary judgment. Defendant asserted that Jill could not show causation, i.e., that defendant's alleged breach of duty caused Jill any damages. Based upon Jill's discovery responses, defendant claimed that Jill could not present evidence to raise a triable issue of material fact that, absent defendant's negligence, she would have recovered damages from Stanley for his alleged breach of fiduciary duty through dissipation of community assets.

7. *The Trial Court's Order and Judgment*

The trial court granted defendant's motion for summary judgment, and entered judgment accordingly. The trial court found: "Plaintiff[s] cannot establish that any of the money purportedly spent by Stanley Cohen on a mistress was community property, or belonged to Plaintiff." Plaintiffs filed a timely notice of appeal.

CONTENTIONS

Plaintiffs contend that they raised a triable issue of material fact as to whether Jill could have prevailed in the bankruptcy proceeding, and thus, whether defendant caused her damage by not filing an adversary proceeding in the bankruptcy action.[3]

STANDARD OF REVIEW

This court reviews de novo a trial court's order granting a motion for summary judgment. (*Carlton v. Quint* (2000) 77 Cal.App.4th 690, 698-699.)

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[3] Before the trial court, defendant also asserted that plaintiffs could not establish triable issues of material fact that: (1) Jill's claims against Stanley would have been non-dischargeable in bankruptcy; or (2) she could have collected on any judgment against Stanley. The trial court did not rely upon either of these arguments in granting summary judgment for defendant. Defendant does not raise them on appeal as separate grounds for affirming the trial court judgment. We have no occasion to address either argument.

DISCUSSION

1. *Causation*

On this record, plaintiffs raised a triable issue of material fact as to whether defendant Myer's negligence caused her damage. This conclusion is based upon the fact that Jill raised a triable issue of material fact regarding whether she could have proved in the bankruptcy proceeding that community funds exceeded community expenses and that Stanley dissipated community assets.

Defendant, accused of malpractice and thus standing in Stanley's shoes (*Garretson v. Harold I. Miller* (2002) 99 Cal.App.4th 563, 568-569) asserts that the " 'family living expense tracing' " model (*In re Marriage of Braud* (1996) 45 Cal.App.4th 797, 822-823) shows that Stanley could not have spent community property on his extra-marital affair. The trial court relied upon this tracing model in granting summary judgment.

Under the family living expense tracing model, also called " 'recapitulation' " (*In re Marriage of Braud*, *supra*, 45 Cal.App.4th at p. 823), "it is assumed that family living expenses are paid out of community property funds." (*Ibid*.) Pursuant to this method, "[p]ayments may be traced to a separate property source by showing community income at the time of the payments or purchase was exhausted by family expense, so that the payments or purchase necessarily must have been made with separate property funds. [Citations.] *The recapitulation must be sufficiently exhaustive to establish not only that separate property funds were available to make the payments, but that they were actually used.* [Citation.] *As with direct tracing, the record must demonstrate that community income was depleted at the time the particular asset was acquired*." (*In re Marriage of Braud*, *supra*, at p. 823 (italics added).)

Defendant asserts that Stanley did not breach his fiduciary duty because he did not dissipate Jill's interest in community property. Defendants assert that if all the community assets and liabilities for the time period in question are tallied and the community expenses are subtracted from the community assets and income, this will show that there were no community assets remaining, which could have been dissipated by Stanley. Defendant postulates that this tracing method shows that Stanley must have spent his separate property on community expenses because the community assets were insufficient to cover those community expenses. Defendant also asserts that this would show as a matter of law that Stanley could not have spent community assets on the extra-marital affair, or otherwise have mismanaged any community assets.

On this record, we conclude that defendant has not satisfied his burden of production with respect to the entire time period, and that Jill has raised a triable issue of material fact as to whether she could have shown that Stanley dissipated community assets.

According to Jill, the relevant time period during which Stanley allegedly breached his fiduciary duty was 1988 to 1995. Defendant claims that the parties' income as reflected in the joint tax returns, the amount of the mortgage on the parties' Malibu house, and the expenses of Jill's dog breeding business show that community property could not have been dissipated by Stanley in breach of his fiduciary duty.

In order for defendant to prevail by relying on the recapitulation tracing method, the record must be sufficiently clear to show that community property was depleted and that separate property was actually used for Stanley's extra-marital affair. (*In re Marriage of Braud*, *supra*, 45 Cal.App.4th at p. 823.)

In 1988, Stanley and Jill purchased the Malibu house.[4] The record does not show the amount of the monthly mortgage costs at that time. The interest paid that year, however, was $87,978.

The parties' 1988 joint tax return shows total gross income of $483,542. The return shows that Stanley received $296,705 in distributions from the Earl Cohen Trust.

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[4] Pursuant to Family Code section 760, on this record absent evidence to the contrary because it was acquired during the marriage, we must presume the Malibu house was community property.

Schedule D shows capital gain income of $372,004 for "Net long-term gain . . . from partnerships, S corporations, and fiduciaries."[5]

The parties' joint tax return shows that in 1988, Jill's gross income as a dog breeder was $24,275, with total expenses of $156,758, for a net loss of $134,483. The 1988 return shows that Stanley had zero dollars in income as a real estate consultant and $30,808 in expenses.[6] Stanley and Jill also sustained a loss of $11,737 in their horse-related business.

Finally, the record shows that in 1988 Jill and Stanley had $17,453 in medical expenses and $27,600 in charitable contributions.

Thus, using the recapitulation method of tracing, the numbers add up as follows: For purpose of this motion, community income equaled $24,275 (dog breeding income) plus $372,004 (capital gain income) plus $3,512 (interest income) for a total amount of $399,791 in community income.

On this record community expenses equaled $87,978 (home mortgage interest), plus $156,758 (dog breeding costs), plus $30,808 (real estate consulting costs), plus $11,737 (horse business cost), plus $17,453 (medical expenses) and plus $27,600 (charitable contributions) for a total of $232,334.[7]

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[5] In his moving papers, defendant does not attempt to characterize this capital gain income as separate property income. Notably, the Schedule D upon which this amount is reflected is in the names of both Jill and Stanley Cohen. Because Stanley's mother passed away in 1989, this sum could not have come from that inheritance. For purposes of this motion only, we must resolve this ambiguity in Jill's favor and conclude this income was community property income.

[6] The fact that the parties' joint tax return shows that Stanley was engaged in real estate consulting in 1988 directly conflicts with the trial court's ruling that Stanley retired in 1986. The trial court therefore abused its discretion by striking Jill's declaration as to when Stanley retired.

[7] While there may have been more community expenses, such as utilities, insurance, or automobile expenses, none of these types of expenses are disclosed in the record.

Thus, for purposes of this motion only and on this record, community income was $167,457 greater than community expenses for the year 1988. Jill's expert accountant, David Fox, submitted a declaration to the trial court. There, Fox declared that from 1988 to 1992, Stanley spent a total of $1,329,910.76 upon the extramarital affair. There is no specific breakdown for the year 1988. Averaging the five-year time period, Stanley spent approximately $265,982 per year on the extramarital affair.

On this record, there is no way for this court to conclude one way or another whether Stanley spent the $167,457 in surplus community income upon community expenses or upon his extra-marital affair. Thus, there is a triable issue of material fact as to whether Stanley breached his fiduciary duty by dissipating community property in 1988. Having reached this conclusion for the year 1988, we have no occasion to address the remaining years during the time period in question.

Significantly, however, we do note that defendant presented almost no evidence of community expenses or income for the years 1992 through 1995. Thus, for those years, defendant failed to satisfy the burden of production, which constitutes a separate and independent ground for reversing the summary judgment in favor of defendant. In other words, the trial court had no evidence of community expenses or community income for these years in question and thus could not have applied the recapitulation method of tracing.

DISPOSITION

The judgment is reversed. Plaintiffs are to recover costs on appeal.

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KITCHING, J.

We concur:

KLEIN, P.J.

ALDRICH, J.